86-802

No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

HOLIDAY UNIVERSAL, INC.,
Appellant,

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*,
Appellees.

On Appeal from the Court of Special Appeals of Maryland

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Appellant provides women with single sex aerobics dance classes that are specifically designed for the aerobic capacities and needs of females, whose cardiovascular, respiratory and other aerobic systems are less capacious than men's. Women desire to take aerobics dance classes in order to greatly improve their health and conditioning, but many women are embarrassed to be in aerobics dance classes with men because some aerobics dance exercises are sexually very suggestive or sexually very revealing. Though men cannot attend the aerobics dance classes appellant specifically designs for women, men have extensive access to other forms of highly beneficial aerobics exercises, as well as to aerobics dance classes given by several organizations other than appellant. In these circumstances the question presented by this case is: whether the constitutional guarantees of privacy and association bar governmental impairment of women's right to have aerobics dance classes that are designed for and can be attended by women only.

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceedings below were the appellant, Holiday Universal, Inc.*; the appellee, Montgomery County, Maryland; the Montgomery County Commission On Human Relations; three members of the Public Accommodations Panel of the Commission On Human Relations—Sue Shoenberg, Phoebe Liddle, and John Buchan; and the Executive Director of the Commission On Human Relations, Alan Dean.

The parent corporation of appellant is U.S. Health, Inc., which owns all the stock in appellant.

Appellant has no partially owned subsidiaries, but has three wholly owned subsidiaries. The three are Great American Financial Management Corporation, Holiday Health of Falls Church, Inc., and Dreams Inc.

Appellant has affiliates which, like itself, are wholly owned by U.S. Health, Inc. The affiliates are: Strategic Planning Limited, U.S. Management Services, Inc., Cash Management, Inc., National Credit Management Corporation, National Bureau of Credit, Inc., Holiday Universal Club of Virginia Plaza, Inc., Holiday Universal Club of Northshore, Inc., Gymco Construction Company, Inc., Holiday Development Corporation, Health & Fitness Operations, Inc., and Holiday Administrative Services, Inc., T/A National Administrative Services. Two of these affiliates, Strategic Planning Limited and U.S. Management Services, Inc., jointly own Executive Management Services Associates.

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* The lower courts mistakenly referred to appellant as Holiday Universal Club.

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MONTGOMERY COUNTY, MARYLAND, *et al.*,
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On Appeal from the Court of Special Appeals of Maryland

JURISDICTIONAL STATEMENT

Holiday Universal, Inc. appeals from a judgment of the Court of Special Appeals of Maryland.

OPINIONS BELOW

The trial court order denying a requested injunction was issued without written opinion. (The trial court simply wrote the word "Denied" on the face of a proposed injunctive order.) The trial court's oral reasons for denying the injunction are reproduced in Appendix A. The opinion of the Court of Special Appeals of Maryland upholding the denial of injunction is reported at 67 Md. App. 568, and is reproduced in Appendix B. The order of the Court of Appeals of Maryland denying

a petition for certiorari is unreported and is reproduced in Appendix C.

JURISDICTION

The judgment of the Court of Special Appeals of Maryland, upholding the constitutionality of an ordinance of Montgomery County, Maryland, was filed on May 15, 1986. The order of the Court of Appeals of Maryland denying a petition for certiorari was issued on August 22, 1986. A notice of appeal to this Court was filed on November 6, 1986, and is reproduced in Appendix D.

This Court has jurisdiction by appeal under 28 U.S.C. § 1257(2) because appellant claimed the county ordinance at issue was invalid under the United States Constitution, and the decision below was in favor of its validity. Should the Court conclude that the case is not reviewable by appeal, Holiday Universal, Inc. asks that this paper be treated as a petition for certiorari, in which case jurisdiction lies under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The constitutional provisions involved are those creating the rights of privacy and association; such provisions include the First, Fourth, Fifth, Ninth and Fourteenth Amendments. The ordinance involved is Montgomery County Code, Chapter 27, which bars distinctions based on sex in places of public accommodation.

Relevant provisions of the Constitution and ordinance are set forth in Appendix E.

STATEMENT

A. Introduction.

This case presents sexual discrimination issues of great importance to thousands of governmental entities and private businesses all across the nation. Federal courts of

appeal have divided on the issues, as have state appellate courts, federal trial courts and state trial courts. Guidance from this Court is badly needed so that there will no longer be "'one rule in Athens, and another rule in Rome.'" *Laird v. Tatum*, 409 U.S. 824, 838 (1972).

B. The Initiation Of A Sex Discrimination Case, And Consequent Proceedings In The State Courts.

This case is one of a pair of tandem proceedings involving the question whether health and fitness clubs operated by appellant in Montgomery County, Maryland have engaged in unlawful sex discrimination in violation of the county's public accommodations law. This question has arisen because appellant conducts a program of single sex aerobics dance classes for women only.

The tandem proceedings began when three young men, Bruce Pollekoff, Earnest Sahady and Ronald Busch, filed complaints with the Montgomery County Commission On Human Relations. The three complainants are exceptionally athletic and fit individuals. Pollekoff weight lifts, plays racquetball, bicycles twenty miles every other night and fifty to one hundred miles on weekends, and runs three miles every other night. Tr.[1] 110-112. Sahady was voted the outstanding senior athlete, the outstanding senior baseball player, and the outstanding senior basketball player in his county when in high school, was all conference and all county in high school football for two years, played varsity football in college, currently plays football, basketball, racquetball and tennis, and jogs one to two miles at a time. Tr. 219-223. Busch plays racquetball, basketball and softball, runs three to five miles three times a week at a speed of one mile every six to seven minutes, and has won ten kilometer races, twenty kilometer races, five mile races and ten mile races. Tr. 354-357. These three exceptionally fit and athletic

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[1] "Tr." refers to the transcript of hearing before the Public Accommodations Panel of the Montgomery County Commission on Human Relations.

men alleged that they had been subjected to unlawful sexual discrimination because they were barred from aerobic dance classes specially designed for the physiques and aerobic capacities of average female health club members who are twenty-five to thirty-five years old.

The Commission On Human Relations subsequently issued "Determination[s]" finding that there may have been unlawful discrimination, and assigned the matter to its Public Accommodations Panel for a public hearing scheduled to commence on June 18, 1985. On June 7, 1985, appellant Holiday Universal, Inc. filed a complaint in the state trial court (which is called the Circuit Court). Appellant sought to enjoin the Commission's proceedings, alleging, *inter alia*, that the public accommodations ordinance is unconstitutional.

On June 17, 1985, the state trial court held a hearing and denied an interlocutory injunction. It orally stated that appellant had not met any of the four factors required for an injunction in Maryland. App. A, pp. 1a-2a. Among the four factors that appellant allegedly failed to meet were the need to show a likelihood of success on the merits and the need to show irreparable injury if an injunction does not issue.

Appellant appealed the denial of injunction to the intermediate state appellate court (called the Court of Special Appeals of Maryland). Appellant again asserted the county ordinance is unconstitutional. On May 15, 1986, the intermediate appellate court issued an opinion upholding the ordinance and affirming the denial of an interlocutory injunction. App. B. The appellate court agreed with the trial court that appellant had failed to meet any of the four prerequisites for an injunction, and said that most notable was the failure to show a likelihood of success on the merits or irreparable injury. App. B, p. 11a.

Appellant then sought a writ of certiorari from the State's highest court (called the Court of Appeals of

Maryland). Appellant asserted once again that the county ordinance is unconstitutional. A writ of certiorari was denied by order of August 22, 1986. App. C.

The present petition to this Court follows the denial of certiorari by the Court of Appeals of Maryland.

C. Hearings Before The Public Accommodations Panel.

Because the requested injunction was denied by the state trial court, hearings were held by the Public Accommodations Panel in the administrative proceeding that is tandem to appellant's injunctive efforts. The hearings resulted in a nearly 1,600 page transcript containing extensive expert testimony on the physical and aerobic differences between men and women, the design of aerobic dance exercises that are specially geared to the needs and capacities of women, the social and sexual embarrassments many women suffer in coeducational aerobics dance classes, and the existence of such classes for those men, and those unembarrassed women, who wish to take them.

The record of the hearing thus demonstrates the following in plenitude [2]:

1. Aerobic capacity is the ability to take in, transport, and use oxygen in the body. Tr. 486-487. A physically fit woman would generally have an aerobic capacity ten to twenty percent less than that of a physically fit man the same age. Tr. 488, 489. There are several physiological reasons. Women have a smaller lung capacity and smaller lung diffusing capacity (which is the ability to move oxygen and carbon dioxide across the capillary membrane). Tr. 489-490. Women have a lower capacity to carry oxygen in the blood because they have a smaller volume of blood and less hematocrit, which is the percentage of red, oxygen-carrying blood cells. Tr. 490-492. Women have

[2] A copy of the transcript of hearing has been lodged with the Clerk of the Court.

a smaller cardiac output potential, which means they have a lower ability to pump oxygen-carrying blood through the circulatory system. Tr. 492-494. The lower cardiac output potential is partly due to women's smaller left ventrical capacity. Women's oxydative enzyme system also has a smaller capacity than men's; women are therefore at a disadvantage in metabolically combining oxygen with bodily substrates to produce energy. Tr. 494-495.

2. Women have less muscle mass than men as a percent of total body mass, and therefore have less capacity to exert force. Tr. 496-497. (Female muscle mass is approximately 36 percent; male muscle mass is approximately 45 percent. Tr. 496.) Women have more essential body fat than men by 12 percent to 4 percent, and more overall body fat by 27-28 percent to 15 percent. Tr. 497-498. Men's fat tends to be deposited around their waists. Tr. 500. Women's fat tends to be deposited on the hips, thighs and buttocks, or in the breasts, or, in some groups, uniformly about the body. Tr. 500-502.

3. Men have a higher level of testosterone, which correlates with bodily responses to training, size of muscle mass, and strength. Tr. 499.

4. Women have only 70 percent of the lower body strength, and about 50-60 percent of the upper body strength, possessed by men. Tr. 509-510. Men have better muscular endurance. Tr. 511. On the other hand, women have greater flexibility than men. Tr. 511-512, 1085-86, 1135.

5. Women's heart rate is greater than men's for a given amount of aerobic dance exercise. Thus women can benefit from a level of aerobic work that would not benefit men. Tr. 517.

6. Appellant's aerobic dance programs are specially designed by experts in dance, exercise, and exercise physiology to benefit the aerobic needs of the average female member of petitioner's health clubs, who is between 25

and 35 years of age.[3] Tr. 473-480, 533, 572-577, 584, 585, 1064, 1066-67, 1071-73, 1250. The appropriate design to obtain this benefit is achieved by using the correct type of exercises for women, and by doing them with the intensity and frequency, and for the duration, that is suitable for women rather than men. Tr. 573-578.

Each program has a warm-up period, then systematically has exercises for various parts of the body, including the cardiovascular system and the respiratory system, and then ends with cooling down exercises. Tr. 534, 544. Appropriate exercises for each segment of the program are selected from a library of about 300 different exercises and are combined with appropriate music. Tr. 535-536, 539. Appellant changes its programs every six weeks, and each time it teaches the new program to its 225-250 aerobics dance instructors. Tr. 538, 539, 552, 1063. The instructors are not allowed to deviate from the program when leading classes, because quality control is very important. Tr. 555-558, 565, 819; see 1267-1268.

7. Because women are particularly concerned with the hip and thigh areas (where females often have concentrations of bodily fat), the design of appellant's programs includes many exercises for those particular areas. Tr. 1082, 1134. Such exercises are not necessary for men. Tr. 1082-1083. Also, many of the exercises in petitioner's program require the expenditure of less physical force and the use of less strength than would be suitable in a program for men. Tr. 1083.

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[3] Dr. Arthur Curtis, who has overall supervisory responsibility for appellant's aerobics dance programs, has a Ph.D. in exercise physiology, has taught cardiovascular dynamics, advanced exercise physiology and exercise program design at the University of Maryland, has two certifications from the American College of Sports Medicine, and has set up many corporate and governmental fitness programs. Tr. 473-480.

8. Being geared to the aerobic needs of average women who are 25-35 years old, appellant's programs would not benefit the average male. Tr. 578, 583, 592, 596, 815, 1253, 1288. The programs therefore would not provide the average male with a high quality product. To redesign each six-week program so that it would benefit the average male would cost 50-75 thousand dollars per year. Tr. 785, 813-814. If the programs were designed to benefit the average male, they would be overly difficult for the average female and potentially injurious to her because of their increased intensity and the accompanying stress. Tr. 595, 755, 1251-1252.

9. Many women are embarrassed when men are in an aerobics dance class with them, and these women often stay away from coeducational classes. Tr. 787-789, 793-795, 804, 1113-1114. There are a number of reasons for the embarrassment. Some aerobics dance exercises are sexually very suggestive. Examples are leg splits done in a "doggie" position, and an exercise called the agitator crunch, in which a woman assumes a birthing position and moves from side to side. Tr. 1088-89, 1140-1143. Sometimes aerobic dance exercises cause leotards worn while exercising to become very revealing. Tr. 1089. And some women feel their bodies are flabby or unattractive, and they don't wish to be seen by men while exercising. Tr. 1089, 1090-1091.

10. Aerobic dancing is only one form of aerobic exercise. Other forms include running, jogging, swimming, bicycling, walking and, when done suitably, weight lifting. Tr. 136, 525-528, 591, 595, 1095. Running, jogging, swimming, stationary bicycling and weight lifting are offered to men at petitioner's health clubs. Also, though there is little demand for aerobics dance classes for men, those men who do desire them can take many aerobics dance classes that are offered on a coeducational basis by national organizations that operate in Montgomery County. Tr. 129, 174, 806, 1024-1025. These national

organizations include such well-known programs as Jazzercize, Body by Gilda, and Jackie Sorenson.[4]

D. The Panel's Ruling On Liability And Its Order Requiring Changes In Appellant's Program.

At the conclusion of the liability phase of its hearing the Public Accommodations Panel ruled that, by conducting a program of single sex aerobics dance classes for women only, appellant had engaged in unlawful sexual discrimination in violation of Montgomery County's public accommodations law. App. F. The Panel therefore ordered appellant to alter its program within ten days. Under the order, such alteration can consist either of making appellant's classes coeducational or holding separate classes for men.[5] App. F, pp. 31a-32a.

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[4] Also, men can even do aerobics dance exercises at appellant's health clubs by exercising individually to video tapes put out by Jane Fonda. Tr. 128, 234-235, 265, 606-607. These tapes, unlike petitioner's classes, are not specially designed for women.

[5] The order of alteration is presently stayed, but the stay may well dissipate. The circumstances are these: Because the Panel had bifurcated its hearing, the damages phase was to commence after the liability decision. Appellant, however, sought immediate review of the liability decision in the state courts. The state trial court rejected such review, but ordered a stay of the alterations order until a Panel decision on damages.

Appellant then requested review of the liability decision in the State's intermediate court of appeals, which has not yet ruled on the request, and the county informally agreed to stay the alterations order pending conclusion of appellant's efforts to obtain immediate review of the liability question. If appellant's efforts to obtain review fail, as they have thus far, the alterations order will take effect after a Panel decision on damages.

THE QUESTIONS ARE SUBSTANTIAL

This case raises highly important questions concerning the extent to which there must be sexual integration in physical and athletic activities—activities that are pervasive in our society. The questions have vexed private groups, governmental entities and courts for the last fifteen years or more. During that period there have been dozens of cases in federal and state trial and appellate courts,[6] with widely varying results, and it has been necessary for Justice Stevens to significantly opine on pertinent questions in his capacity as Circuit Justice. *O'Connor v. Board of Education of School District 23 et al.*, 449 U.S. 1301 (1980) (opinion of Stevens, J.).

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[6] E.g., *Clark etc. v. Arizona Interscholastic Ass'n*, 695 F.2d 1126 (9th Cir. 1982); *Yellow Springs etc. v. Ohio High School Athletic Association*, 647 F.2d 651 (6th Cir. 1981), reversing 443 F. Supp. 753 (S.D. Ohio 1978); *Brenden v. Independent School District 742*, 477 F.2d 1292 (8th Cir. 1973); *Morris v. Michigan State Board of Education*, 472 F.2d 1207 (6th Cir. 1973); *Lantz by Lantz v. Ambach*, 620 F. Supp. 663 (S.D.N.Y. 1985); *O'Connor v. Board of Education of School Dist. 23*, 545 F. Supp. 376 (N.D. Ill. 1982); *Lafler v. Athletic Control Board*, 536 F. Supp. 104 (W.D. Mich. 1982); *Gomes v. Rhode Island Interscholastic League*, 469 F. Supp. 659 (D.R.I. 1979), vacated and dismissed as moot, 604 F.2d 733 (1st Cir. 1979); *Leffel v. Wisconsin Interscholastic Athletic Ass'n*, 444 F. Supp. 1117 (E.D. Wis. 1978); *Hoover v. Meiklejohn*, 430 F. Supp. 164 (D.Colo. 1977); *Clinton v. Nagy*, 411 F. Supp. 1396 (N.D. Ohio 1974); *Attorney General v. Massachusetts Interscholastic Athletic Ass'n*, 393 N.E.2d 284 (Mass. 1979); *Darrin v. Gould*, 540 P.2d 882 (Wash. 1975); *Mularadelis v. Haldane Central School Board*, 427 N.Y.S.2d 458 (N.Y. S.Ct. App. Div. 1980); *Petrie v. Illinois High School Ass'n*, 751 Ill. App. 3d 980, 394 N.E. 2d 855 (Ill. App. Ct. 1979); *Forte v. Board of Education Etc.*, 431 N.Y. S.2d 321 (N.Y. 1980); *Commonwealth of Pennsylvania v. Pennsylvania Intersch. Ath. Ass'n.*, 334 A.2d 839 (Pa. Commw. Ct. 1975); *National Organization For Women v. Little League Baseball*, 127 N.J. Super. 522, 318 A.2d 33 (N.J. 1974); *see Cape v. Tennessee Secondary School Athletic Ass'n*, 563 F.2d 793 (6th Cir. 1977).

As made evident by the many lower court opinions and the opinion of Justice Stevens, serious and important constitutional questions are presented by the issue of sexual integration in the physical and athletic activities that pervade the nation. The Court should grant a plenary hearing in this case to provide the country with guidance on those constitutional questions.

I. PROBABLE JURISDICTION SHOULD BE NOTED BECAUSE THE COUNTY'S ACTION VIOLATES CONSTITUTIONAL GUARANTEES OF PRIVACY AND ASSOCIATION.

This case presents the question whether the constitutional guarantees of privacy and association protect women's right to try to improve their health, conditioning, and physical prowess by engaging in sexually segregated physical activities that are specifically designed to meet the physical and psychological needs of females.

This Court has often "recognized that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution." *Roe* v. *Wade*, 410 U.S. 113, 152 (1973). The right of privacy, or zones of privacy, have protected activities and physical areas that are fundamentally important to the development and welfare of citizens. Because they perform this function, the right, or zones, have protected actions and areas even when the actions or areas are not wholly "private" in the sense of being totally unobserved.

Thus the right of privacy, or zones of privacy, have succoured a woman's right to decide to have an abortion, *Griswold v. Connecticut*, 381 U.S. 479 (1965); the right of married couples to hear a speech about contraception and receive contraceptives from the lecturer, *Eisenstadt v. Baird*, 405 U.S. 438 (1972); group association necessary to preserve freedom of association, *NAACP v. Alabama*, 357 U.S. 449 (1958); the right to view printed or filmed sexual materials in one's home,

Stanley v. Georgia, 394 U.S. 557 (1969); the right to be free of unlawful police intrusion in homes and on streets, *Terry v. Ohio*, 392 U.S. 1, 8-9 (1968); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961); and other actions and interests. See generally *Roe v. Wade*, *supra*, 410 U.S. at 152-153 (pointing out that the right of privacy has application to marriage, procreation, family relationships, child rearing, children's education and contraception).

The Court also has long recognized the existence of a constitutional right of association. *Roberts v. United States Jaycees*, 448 U.S. 609, ——, 104 S.Ct. 3244, 3249-3252. Like the right of privacy, the right of association protects interests of fundamental importance to citizens. *Roberts v. United States Jaycees* thus makes clear that associational rights encompass matters relating to marriage, childbirth, educating children, living with one's relatives, privacy in one's home, religion, and grouping together in pursuit of a wide range of political, social, economic, and cultural ends. 448 U.S. at ——, 104 S.Ct. at 3249-3253.

The constitutional guarantees of privacy and association should be held in this case to protect the rights of women who wish to participate in single-sex classes that offer physical activities specifically designed to meet the physical and psychological needs of females. Women take part in physical activities and athletics for the purpose of improving their health, conditioning and prowess. Here they participate in appellant's aerobic dance classes to improve their health and conditioning by bettering their cardiovascular systems, their respiratory systems and, in general, their ability to make use of oxygen. Improving one's health and conditioning by bettering these vital bodily systems is surely a fundamental interest that ranks with the others protected by privacy and association. Accordingly, it too should be protected by the rights of privacy and association.[7]

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[7] There is no question but that appellant has jus tertii standing to assert the rights of the women who wish to attend its classes.

There also are additional reasons to grant women the constitutional protections sought here. For decades women were the victims of serious and debilitating discrimination in connection with athletics and physical exercise. There were relatively few teams or programs for them in schools or elsewhere. In this regard women were, so to speak, the forgotten men of society. Men, on the other hand, had extensive opportunities available to them in athletics and exercise. Men's plethora of opportunities continues to this day, so that males still have far more opportunities available to them in athletics and exercise.

The long-standing imbalance in opportunities has put women at a severe disadvantage. Programs specifically designed for women are an effort to rectify this disadvantage. It would simply be perverse if such programs were to be struck down, or their effectiveness deeply compromised, because they do not provide for men, who already have far more opportunities and outlets than women do. In the name of allegedly eliminating discrimination, such result would instead promote it by helping to perpetuate imbalance in a society now dedicated to its eradication.[8]

The public accommodations ordinance at issue operates directly upon appellant and causes it injury in fact. Simultaneously, the ordinance impairs the rights of females with whom appellant has a direct relationship, rights that appellant is ideally situated to assert in a most vigorous manner but that the females themselves cannot assert because the ordinance does not operate upon them. In circumstances such as these, including cases in which standing was asserted by comparably situated parties who sold educational services or sold products, the Court has regularly found jus tertii standing. *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Craig v. Boren*, 429 U.S. 190 (1976); *Singleton v. Wulff*, 428 U.S. 106 (1976); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

[8] The instant case exemplifies the perversity. Here men in superb physical condition seek entrance to classes specifically designed for females, even though the men have a plethora of other

II. PROBABLE JURISDICTION SHOULD BE NOTED, AND A PLENARY HEARING GRANTED, TO PROVIDE GUIDANCE ON THE IMPORTANT QUESTION OF WHAT INTERESTS JUSTIFY GOVERNMENTAL ACTION BARRING OR CREATING ALLEGED SEXUAL DISCRIMINATION IN EXERCISE AND ATHLETICS.

1. When government infringes constitutional rights, its action cannot stand unless it demonstrates a sufficient interest. In the field of sexual discrimination, the question of sufficient interest has arisen in two converse situations. One, as here, occurs when government seeks to bar alleged sexual discrimination by private parties who properly rely on constitutional guarantees. See *Roberts v. United States Jaycees*, 448 U.S. 609, 104 S.Ct. 3244 (1984). In such cases government needs a compelling interest in order to bar the alleged discrimination. *Roberts v. United States Jaycees, supra*, 448 U.S. at ——, 104 S.Ct. at 3252-55.

The other situation occurs when government itself is engaging in the claimed discrimination. In such instances, the government action cannot stand unless it serves important governmental objectives and is substantially related to achieving those objectives. *Heckler v. Mathews*, 465 U.S. 728, 744, 104 S.Ct. 1387, 1397 (1984); *Mississippi University For Women v. Hogan*, 458 U.S. 718, 721 (1982); *Michael M. v. Sonoma County Superior Court*, 450 U.S. 464, 468-69 (plurality opinion of Rehnquist, J.), 476 (opinion of Stewart, J.) (1981).

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aerobic opportunities, even including ample access to aerobic dance classes given by organizations other than appellant. Should men obtain the desired entrance, females who are sexually or socially embarrassed will withdraw, thereby losing the intended benefits. Also, to provide benefits to the men, appellant will have to drastically alter its programs in ways that will greatly lessen their benefit for women, or will have to offer wholly separate programs for men who already have extensive other aerobic opportunities.

Regardless of which of the two situations is involved in a case, many of the same factors are considered in determining whether government has the necessary interest. This was made clear in *Roberts v. United States Jaycees*, *supra*, 468 U.S. at ——, 104 S.Ct. at 3253-54, where the Court expressly considered a number of the same factors in a case brought *by* government as it considers in cases *against* government. Thus, regardless of the type of case involved, sexual discrimination will fall if it reflects archaic stereotypes about the role and nature of women, or is based on overbroad and insupportable assumptions unrelated to differences between men and women, or reflects the barriers that have plagued women, or if it stigmatizes women. *Roberts v. United States Jaycees*, *supra*, 468 U.S. at ——, 104 S.Ct. at 3253-54; *Heckler v. Mathews*, *supra*, 465 U.S. at 744; *Mississippi University for Women*, *supra*, 458 U.S. at 724; *Michael M. v. Sonoma County Superior Court*, *supra*, 450 U.S. at 468-469.

On the other hand, because ' " 'things which are different in fact' " ' need not ' " 'be treated in law as though they were the same,' " ' alleged discrimination will not be struck down if it "realistically reflects the fact that the sexes are not similarly situated in certain situations." *Michael M. v. Sonoma County Superior Court*, *supra*, 450 U.S. at 469 (quoting *Rinaldi v. Yeager*, 384 U.S. 305, 309 (1966)). Thus the Court "has consistently upheld" actions that validly reflect differences in the situations of males and females, especially since it is permissible to " 'provide for the special problems of women'." *Ibid.* (quoting *Weinberger v. Weisenfeld*, 420 U.S. 636, 653 (1975)).

2. In the field of athletics and physical exercise, the application of principles governing sexual discrimination has been fraught with conflict and confusion in connection with the issues raised by this case. Among the areas

of division repeatedly appearing in the numerous cases cited above (in note 6) are these:

A. A major issue is whether opportunities for men and women must be precisely the same. Some courts think not, but other courts have given an affirmative answer. On several occasions, though not always, the affirmative view has been carried to the point of requiring that girls be allowed to participate in heavy contact sports like football, while men conversely must be permitted to participate in such activities as girls' volleyball.[9]

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[9] The cases cited in note 6 *supra* which take the position that the same athletic opportunities must be provided for men and women are: *Brenden v. Independent School District 742* (girls must be allowed to play on men's teams, at least in non-contact sports); *Morris v. Michigan State Board of Education* (girls must be allowed to play on men's teams in noncontact sports); *Lantz by Lantz v. Ambach* (a girl had to be allowed to try out for a boys' football team); *Gomes v. Rhode Island Interscholastic League* (district court opinion) (boy must be allowed to play on girls' volleyball team); *Leffel v. Wisconsin Interscholastic Athletic Ass'n.* (girls must be allowed to participate in men's basketball and tennis); *Yellow Springs etc. v. Ohio High School Athletic Association* (district court opinion) (girls must be allowed to play on men's teams in contact sports, including football); *Hoover v. Meiklejohn* (girls must be allowed to play on men's soccer team); *Clinton v. Nagy* (a girl must be allowed to try out for a boy's football team); *Attorney General v. Massachusetts Interscholastic Athletic Ass'n* (boys must be permitted to play on girls' teams); *Darrin v. Gould* (girls must be allowed to try out for men's football team); *Petrie v. Illinois High School Ass'n* (boy must be permitted to play on girls' volleyball team); *Commonwealth, Packel v. Pennsylvania Intersch. Ath. Ass'n* (girls must be allowed to participate in men's sports, including football and wrestling); *National Organization For Women v. Little League Baseball* (girls must be allowed to participate in boys' baseball).

The cases cited in note 6 *supra* which have ruled that men and women need not be provided with precisely the same athletic opportunities are: *Clark etc. v. Arizona Interscholastic Ass'n* (boys can be barred from a girls' volleyball team); *O'Connor v. Board of Education of School District 23* (girls can be barred from a men's

When total equality is required, there is the additional issue of whether it is satisfied by having separate men's and women's teams in each sport, or whether a woman of sufficient ability must be permitted to play on the men's team in order to face stiffer competition and attain a higher level of personal achievement.

B. In considering whether the same sports must always be provided for men and women, and whether women must be allowed to participate in men's athletics, a debated question is whether it is permissible to take account of the fact that women might be more easily injured because they have less muscle and bone and more adipose tissue than men the same size. Some tribunals take the position that such facts are immaterial because men too run risks of injury and girls desire to take the risk.

C. A highly significant issue in situations where there is a women's team but no men's team in a given sport is whether fielding a women's team can appropriately be viewed as a form of affirmative action designed to make up for past discrimination against women in the field of exercise and athletics. Important analogous questions are whether it is permissible to have a women's team but no men's team in a particular sport because men still have far greater *overall* athletic opportunities; and whether men can be barred from the female team because their advantage in muscle and bone will enable them to dominate it to the detriment of females who lose the opportunity to participate or whose skills will not develop because they will be overshadowed by the men.

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basketball team); *Lafler v. Athletic Bd. of Control* (girl can be barred from men's boxing); *Mularadelis v. Haldane Central School Board* (boy can be barred from girls' tennis team); *Forte v. Board of Education etc.* (boys can be barred from girls' volleyball team).

A decision which did not take a clear stand either way is *Yellow Springs, etc. v. Ohio High School Athletic Ass'n* (court of appeals opinion) (plaintiff sought a decision that a rule preventing co-educational teams was unconstitutional).

D. A final major issue is whether, in constructing an exercise program, it is permissible to base it on average differences between men and women, or whether one must instead make individualized determinations regarding each man and woman. If individualized determinations must be made, a girl capable of playing high school football must be allowed to do so even though most females lack the ability. On the other hand, if a program can be constructed on the basis of average characteristics, then a girl can be barred from a men's basketball team though she may be exceptionally skilled, while a boy could be barred from a girl's volleyball team though he lacks the ability to participate on the men's volleyball team.[10]

3. The instant case presents in stark form many of the issues plaguing the subject of alleged sexual discrimination in exercise and athletics. And, at rock bottom, the case raises the question whether government can preclude such alleged discrimination when the state's only interest is that, if considered on a wholly abstract basis, sexual equality might always demand that precisely the same programs must be offered by precisely the same organizations to both men and women.

As made clear above, appellant's program is designed to meet the needs and capacities of a group of average

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[10] This issue was addressed by Justice Stevens, sitting as Circuit Justice in the *O'Connor* case, when he said:

> If the classification is reasonable in substantially all of its applications, I do not believe that the general rule can be said to be unconstitutional simply because it appears arbitrary in an individual case.
>
> It seems to me that there can be little question about the validity of the classification in most of its normal applications. Without a gender-based classification in competitive contact sports, there would be a substantial risk that boys would dominate the girls' programs and deny them an equal opportunity to compete in interscholastic events. *O'Connor v. Board of Education of School District 23*, *supra*, 449 U.S. at 1306-1307 (footnote omitted).

female health club members between twenty-five and thirty-five years of age; the program is not based on individualized determinations concerning specific individuals. Because women have historically been subjected to discrimination in exercise and athletics and still have far fewer opportunities than men, and because appellant's program is offered by a private business that seeks to make a profit, appellant's aerobic dance classes are a market-driven program of compensatory training and opportunity. The program is, in this sense, a market-driven affirmative action program.

Because of physical differences between men and women, and because many women are embarrassed in aerobics dance classes with men, coeducational classes will require changes in the program that will make it of less benefit to women and will cause many women to leave the program and totally lose its benefits. Without such changes, however, coeducational classes would be of no benefit to most men, while the alternative to coeducational classes is the expensive establishment of a wholly separate men's program for which there is little demand. Moreover, men's aerobic needs can be and are satisfied in numerous ways other than aerobic dance, and men even have convenient access to aerobic dance itself.

Furthermore, since the design of appellant's dance program reflects clear physiological differences between men and women, the program is not predicated on untrue generalizations, does not reflect archaic stereotypes regarding the role of either sex, and stigmatizes neither sex. Rather, it "realistically reflects the fact that the sexes are not similarly situated in certain situations" and it "provide[s] for the special problems of women." Conversely—and wholly inconsistently with numerous decisions of this Court [11]—Montgomery County is seeking to

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[11] E.g., *Michael M. v. Sonoma County Superior Court, supra*; *Parham v. Hughes*, 441 U.S. 347 (1979); *Califano v. Webster*, 430 U.S. 313 (1977); *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Kahn v. Shevin*, 416 U.S. 351 (1974).

force '"'things which are different in fact'"' to '"'be treated in law as though they were the same,'"' and is seeking debilitating changes in a program that reflects women's needs and that helps compensate for the fact that opportunities in athletics and exercises are still far less for women than for men.[12]

In the circumstances, the County can offer no persuasive interest justifying inroads upon the rights of privacy and association asserted here.[13] In reality, the only

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[12] It is unhappy irony that the County's Public Accommodations Panel precluded appellant from trying to prove that in its own schools the County does precisely what it is seeking to prevent appellant from doing. Appellant wished to subpoena two employees of the Physical Education Department of the County Board of Education for the purpose of eliciting testimony that there are sports the County schools offer to women but not men. The subpoena was denied by the Public Accommodations Panel, which subsequently denied a motion to disqualify the Panel's chairwoman for a conflict of interest which arose because, when the Panel ruled on the subpoena to the Board of Education's employees, she neither recused herself nor disclosed that she was married to the Board of Education's president. Tr. 20-25, 28.

[13] There is also an additional—and notable—reason why the county can offer no persuasive interest here. As stated above, many women are embarrassed to be in aerobics dance classes with men, because some aerobics dance exercises are sexually very suggestive, some of the exercises cause leotards to become sexually very revealing, and some women feel flabby or unattractive. In short, reasons of sexual modesty cause the embarrassment.

This justification for appellant's single sex program did not prevail before the Public Accommodations Panel. App. F. Yet, the very public accommodations ordinance under which the Panel is proceeding recognizes explicitly that it is permissible to treat men and women differently where sexual modesty or sexual differences are involved. Thus, Section 27-8 of the Montgomery County Code provides that the public accommodations law is inapplicable to "those accommodations which make distinctions based upon sex including such facilities as private schools, rest rooms, dressing rooms, locker rooms, or other dressing facilities." App. E, pp. 19a-20a.

The fact that the County's own ordinance recognizes that differing treatment is allowable where sexual differences or sexual

justification it can proffer is the idea that abstract equality demands that men and women be treated precisely the same in every situation. Though some lower courts seem to have accepted that idea in the area of exercise and athletics,[14] the idea is inconsistent with reality and with this Court's jurisprudence. Appellant believes the Court should grant a plenary hearing to make this clear and to provide guidance regarding the interests which do or do not justify governmental action in the area of alleged sexual discrimination in exercise and athletics.

III. THE ORDER UNDER APPEAL IS FINAL WITHIN THE MEANING OF 28 U.S.C. § 1257.

A. This Court uses an "intensely 'practical' approach" in determining whether an order is final under 28 U.S.C. § 1257. *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976). Thus "the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied." *Ibid.* Though there might otherwise be further proceedings or even whole trials in a lower court, an order will be regarded as final, and review granted, if this "would be the best way to avoid 'the mischief of economic waste and of delayed justice,'" *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-478 (1975) (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)); *North Dakota State Bd. of Pharm. v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 159 (1973). It is irrelevant in this regard that one who appeals an order might prevail at the trial, for "if the [lower] court erroneously upheld the statute, there should be no trial at all." *Cox*

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modesty are involved is yet a further indication of the County's lack of any persuasive justification for preventing appellant from holding aerobics dance classes for women only.

[14] E.g., courts which require that women be permitted to play football on men's teams. See note 9, *supra*.

Broadcasting Corp. v. Cohn, supra, 420 U.S. at 485. Thus, if a decision by this Court would terminate a case, this argues powerfully for finality. *Id.* at 486; *Local No. 438 etc. v. Curry,* 371 U.S. 542, 551 (1963).

Another point of great importance in assessing finality is whether failure to grant review "will 'leave unanswered . . . an important question'" of constitutional law, thus contributing to '"an uneasy and unsettled constitutional posture'" and leaving the parties in limbo. *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 486 (quoting *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241, 247 n.6 (1974)). This consideration is even the more pertinent when the constitutional question "will survive and require decision regardless of the outcome of future state-court proceedings." *Cox Broadcasting Corp. v. Cohn, supra,* 420 U.S. at 480; see *id.* at 482.

Also of significance is whether an order under appeal has an impact on the appellant's federal rights, *Belknap Inc. v. Hare,* 463 U.S. 491, 497-498 (1983); *Nebraska Press Ass'n v. Stuart,* 423 U.S. 1327 (1975) (opinion of Blackmun, J., sitting as Circuit Justice); *Organization For A Better Austin v. Keefe,* 402 U.S. 415, 418 n.1 (1971); or whether, absent review by this Court, the result of further proceedings below will be foreordained because the appellant has no further arguments or because the lower court will have no option but to rule in a particular way. *Mills v. Alabama,* 384 U.S. 214, 217-218 (1966); *Local No. 438 etc. v. Curry, supra,* 371 U.S. at 551, *North Carolina R. R. v. Story,* 268 U.S. 288 (1925).

2. The order denying an injunction in this case is final and appealable under the foregoing governing standards.

In denying an interlocutory injunction, the trial court and the intermediate state appellate court both ruled that appellant will not suffer irreparable injury from the continuation of proceedings charging it with unlawful sex

discrimination. The necessity of and standards for judging irreparable injury are the same in regard to permanent injunctions in Maryland as in regard to interlocutory ones, and appellant has no new arguments to add to its prior claims of irreparable injury. Thus, though there can be further proceedings in the lower courts to try to obtain a permanent injunction, the result of those proceedings is foreordained.

Furthermore, this case involves questions of constitutional law which, if decided in appellant's favor, will terminate the litigation, so that no further proceedings will be required in any tribunal. A decision could therefore avoid economic waste and the injustice of delay. The controlling constitutional questions, moreover, are highly important in the field of sexual discrimination. They are currently in a deeply unsettled constitutional posture, require clarification from this Court for the guidance of a host of private and governmental entities, and are virtually certain to survive and require decision in this case regardless of future lower court proceedings.

Finally, the denial of an injunction is having a major impact on appellant's rights and on its ability to structure its business. In derogation of constitutional rights of privacy and association, appellant has already had to face a lengthy hearing and will have to face the resumption of that hearing. The process of appeals in state courts from adverse decisions of the tribunal holding the hearing is likely to consume three years. During the entire period of future administrative and appellate proceedings, appellant's business plans will necessarily be in an unsettled limbo. This is particularly true because appellant is an interstate business that owns 25 health clubs in various states, cities and counties and which plans to open new health clubs. Numerous of the jurisdictions in which it operates have laws against sexual discrimination which could be invoked against its aerobic

dance program. Until the questions raised by this case are settled, appellant cannot know whether to provide its aerobic dance program in new health clubs, cannot know the extent to which it may face actions elsewhere that are similar to Montgomery County's,[15] cannot know whether it must begin laying plans to change its program, and cannot know whether it will prove truthful to advertise single sex aerobic dancing.

The uncertainty faced by appellant, moreover, is also faced by every other health club that offers single sex programs in any of the more than thirty states and countless cities and counties that have laws forbidding sexual discrimination. All this demonstrates yet further the need for a decision by this Court.

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[15] The State of Maryland, and Montgomery County, Pennsylvania (a suburban area of Philadelphia), have already brought actions similar to Montgomery County, Maryland's.

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction, grant a plenary hearing, and rule that it is unconstitutional for Montgomery County to preclude appellant from offering aerobic dance classes to women only. Alternatively, the Court snould treat these papers as a petition for certiorari, grant certiorari, and issue the requested ruling of unconstitutionality.

Respectfully submitted,

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Date: November, 1986

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APPENDIX A

Oral Reasons Given by the Circuit Court of Montgomery County, Maryland for Denial of the Injunction Requested by Appellant

THE COURT: Be seated, please. All right. The Court having reviewed the file and entertained the arguments of Counsel and referred to some of the appropriate authority, I will address the question of the constitutionality of the question raised by Counsel.

The Human Relations Committee is, as the County is, a creature of the State, and although there is more than one agency dealing with invidious forms of discrimination or providing a forum to address those by aggrieved parties, I have heard nothing nor have I read anything that would make the exercise of similar authority by more than one agency, federal, state and county, totally inconsistent.

It does not appear to me that there is either express or implied exclusivity on the part of the State to solely provide the only forum for redress. So I do not feel that there is any display, and I am not persuaded that pre-emption does exist and that the legislature or the Court, either, ever intended for there to be a pre-emption and exclusivity with the State only to the exclusion of any county or city body.

The other reasons I will not address other than to say that the Court is not persuaded by the argument that I have heard that the statute is unconstitutional, and therefore, that form of declaratory relief is denied. With respect to the request for injunctive relief, it is quite clear that the moving party has to demonstrate at least four factors and if all of the facts put forth before the Court are to be taken as truth, the Court still has to have demonstrated to its satisfaction that in the absence of the granting of this extraordinary form of relief, the in-

junctive relief, there has to be a demonstration of irreparable injury. If the denial of the relief results, the Court has to be satisfied that there is a likelihood of success on the merits by the moving party.

The Court has to consider the public interest and balance of convenience. That test having been laid out, the Court is not satisfied that any one of the four factors that I have just enumerated to have been met by the arguing Counsel, and for that reason, the Court declines to grant the request for injunctive relief. Since the injunctive relief has been denied, then the Motion to Compel Joinder has been rendered academic, and I need not and I do not address that question.

Anything further, Counsel?

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APPENDIX B

Opinion of the Court of Special Appeals of Maryland Upholding the Denial of the Injunction Requested by Appellant

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REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1160
SEPTEMBER TERM, 1985

HOLIDAY UNIVERSAL CLUB

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*

BISHOP
BLOOM
BELL, ROBERT M.,
JJ.

Opinion by Bishop, J.

Filed: May 15, 1986

Holiday Universal Club, Inc. (Holiday) appeals from the denial by the Circuit Court for Montgomery County of its Petition for Injunctive Relief. Of the issues presented by appellant we will review the following two.[1]

I. Is Montgomery County Code, Chap. 27, Article 1, Division 1, unconstitutional either because the County lacked the power to enact such an ordinance or because the ordinance is vague?

II. Did the trial court err in refusing to issue the interlocutory injunction?

FACTS

Allegedly because of their sex, Bruce Pollekoff, Ronald F. Busch and Ernie Sahavy, members of the Rockville Holiday Spa (the Spa), were denied admission to an aerobics dance class held at the Spa. Each filed an individual complaint with the Montgomery County Human Relations Commission (HRC), alleging discrimination in public accommodations. Subsequently, the HRC issued determination letters finding that reasonable grounds existed to believe that appellant, owner and operator of the Spa, discriminated in violation of the Montgomery County Public Accommodation Ordinance of the Montgomery County Code Section 27-9 (the Ordinance) in barring Pollekoff, Busch and Sahavy from the aerobics classes. The HRC scheduled public hearings on the complaints for June 18, 1985, and on June 7, 1985 appellant filed a complaint seeking a declaratory judgment that the Montgomery County Public Accommodation Ordinance

[1] Appellant attempts to incorporate "as if fully set forth in the brief" arguments made in a Memorandum of the Law filed in the circuit court and reproduced in the record extract. This practice is improper; Rule 1031(c)(5) requires the appellant's brief to contain argument in support of its position. *See* Rosenberg v. Rosenberg, 64 Md. App. 487, 515 n.7, 523-24 n.10 (1985). Therefore we consider only those issues upon which appellant supports its position with argument actually contained in the brief.

was unconstitutional and for an interlocutory injunction staying the pending HRC proceedings. The Circuit Court for Montgomery County denied the interlocutory injunction. This appeal followed.[2] Appellees are Montgomery County,[3] the HRC, the individual members of the HRC, and the Executive Director of the HRC.

I.

Constitutionality of Montgomery County Public Accommodation Ordinance

Appellant argues before us that the Montgomery County Public Accommodation Ordinance is unconstitutional because its enactment exceeded the powers granted the Montgomery County Council and because the Ordinance is vague. The trial court, appellant asserts, therefore erred in denying injunctive relief. The Ordinance provides in relevant part:

> DISCRIMINATION IN PLACES OF PUBLIC ACCOMMODATION.
>
> Sec. 27-8. Applicability article.
>
> This article applies to discriminatory practices in places of public accommodation within the territorial limits of the county, and shall apply and be applicable to every place of public accommodation, resort or amusement of any kind in the county whose facilities, accommodations, services, commodities or use

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[2] An order refusing to grant an interlocutory injunction is an appealable order pursuant to Md. Courts & Jud. Proc. Code Ann., § 12-303(3)(iii) (Supp. 1985).

[3] Appellee Montgomery County has abandoned its cross-appeal since no appeal lies from a judgment wholly in its favor. *See* Offutt v. Mont. Co. Board of Education, 285 Md. 557, 564 n.4 (1979). Further, the cross-appeal was not timely because it was not filed within ten days of appellant's order of appeal. *See* Rule 1012f.

are offered to or enjoyed by the general public either with or without charge . . .

Sec. 27-9. Prohibited acts.

It shall be unlawful for any owner, lessee, operator, management, agent or employee of any place of public accommodation, resort or amusement within the county:

(a) To make any distinction with respect to any person based on race, color, sex, marital status, religious creed, ancestry, national origin, handicap, or sexual orientation in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the county.

(b) To display, circulate or publicize or cause to be displayed, circulated or publicized, directly or indirectly, any notice, communication or advertisement which states or implies that any facility service, commodity or activity in such place of public accommodation, resort or amusement will not be made available to any person in full conformity with the requirements of subsection (a) of this section or that the patronage or presence of any person is unwelcome, objectionable, unacceptable or not desired or solicited on account of any person's race, color, sex, marital status, religous creed, ancestry, national origin, handicap, or sexual orientation.

Sec. 27-10. Penalties.

As a part of its order in a discrimination case, the commission panel may require the extension of full, equal and unsegregated accommodations, advantages, facilities and privileges to all persons by the respondent. The commission panel may also order such other affirmative or prospective relief as,

> in the judgment of the panel, effectuates the purposes of this article or is necessary to eliminate the effects of the discriminatory practice. The commission panel may further grant monetary awards determined by the panel from the evidence of record as the actual damages, costs or losses involved or in such amounts as may be specified below:
>
> (a) If the complainant and/or family are denied the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of any place of public accommodations, complainant may be reimbursed in accordance with the standards of proof set forth in section 26-27 for all expenses and compensated for all damages resulting from the unlawful discrimination . . . .

These provisions are contained in a portion of the Montgomery County Code which sets up the HRC and also specifically addresses discrimination in housing and employment and racial and religious intimidation. *See* Montgomery County Code, Section 27.1 *et. seq.*

A.

Power of Charter County

Appellant first asserts that the powers granted to Montgomery County as a charter county do not include the power to enact ordinances to prevent discrimination in places of public accommodation. Appellant correctly notes that Montgomery County is a charter county and as such obtains its powers from Article XI-A of the Maryland Constitution and Maryland Ann. Code, art. 25A, the Express Powers Act.

Among the powers enumerated in art. 25A, § 5, subsection (s) provides, in relevant part:

> The foregoing or other enumeration of powers in this article shall not be held to limit the power of

> the county council, in addition thereto, to pass all ordinances, resolutions or bylaws, not inconsistent with the provisions of this article or the laws of the State, as may be proper in executing and enforcing any of the powers enumerated in this section or elsewhere in this article, as well as such ordinances as may be deemed expedient in maintaining the peace, good government, health and welfare of the county.

This grant of powers provides charter counties with a general police power to enact ordinances for the public good as long as the ordinances are not inconsistent with the other provisions of art. 25A or the other laws of the State. *Snowden v. Anne Arundel County*, 295 Md. 429, 432-33 (1983); *Prince Geo's Co. v. Chillum-Adelphi*, 275 Md. 374, 382 (1975); *Montgomery Citizens League v. Greenhalgh*, 253 Md. 151, 160-61 (1969).

In *Montgomery Citizens League v. Greenhalgh*, the Court of Appeals held that the legislative powers of Montgomery County were broad enough to permit the enactment of fair housing ordinances which prohibited discrimination in housing. 253 Md. at 164-65. The Court's analysis was in two steps. First, the Court concluded that "[n]o doubt can remain as to the power of a state legislature to prohibit discrimination in public accommodations and housing." 253 Md. at 164. The Supreme Court recently reaffirmed this proposition in *Roberts v. United States Jaycees*, —— U.S. ——, 104 S.Ct. 3244, 3252-55 (1984). Second, the *Greenhalgh* Court recognized that the purpose of Article XI-A of the Maryland Constitution was to transfer local lawmaking powers from the state legislature to county governments thereby giving the county council full legislative power to enact local laws on all matters covered by the express grant of powers granted by the Express Powers Act pursuant to Art. XI-A, § 2. 253 Md. 159-60. This point has also been subsequently reaffirmed. *See*

Town of Forest Heights v. Frank, 291 Md. 331, 341 (1981); *Cheeks v. Cedlair Corp.*, 287 Md. 595, 608-09 (1980); *Ritchmount Partnership v. Board*, 283 Md. 48, 56-57 (1978); *County Council v. Investors Funding*, 270 Md. 403, 412 (1973). The *Greenhalgh* Court then concluded that since the State's police power to enact legislation for the public good allows for passage of legislation to prohibit discrimination in public accommodations and housing, and that since the express powers granted Montgomery County include a co-extensive police power, the County can also enact such a provision:

> If then the Legislature could pass a statute [prohibiting discrimination in public accommodations and housing] under the police power of the State, . . . there would seem to be no doubt that . . . [Montgomery County] can pass a valid ordinance having the same end in view.

253 Md. at 165.

Although *Greenhalgh* specifically concerned the fair housing ordinance, a clear implication of the opinion was that the legislative powers of a charter county were broad enough to permit the enactment of ordinances prohibiting discrimination in places of public accommodation. *See Peppin v. Woodside Delicatessen*, —— Md. App. ——, No. 527, September Term, 1985, opinion issued April 2, 1986, slip. op. at 9 (indicating in *dicta* that under *Greenhalgh* Montgomery County had the authority to enact the public accommodation ordinance.) We therefore hold that passage of the Montgomery County Public Accommodation Ordinance was a valid exercise of the police power of the county.

B.

Vagueness

Appellant, relying on the standard set forth in *Miller v. Maloney Concrete Co.*, 63 Md. App. 38, 48-49 (1985), also contends that the Public Accommodation Ordinance

is unconstitutionally vague. Specifically, appellant asserts that nowhere in the ordinance is the term "discrimination" defined and therefore the ordinance fails to provide adequate notice of what a violation would be. We do not agree.

Appellant's reliance on *Maloney* is misplaced. That case addressed vagueness in the context of an ordinance with criminal penalties. 63 Md. App. at 48. The public accommodation ordinance at issue here carries only civil penalties. Further, even if the *Maloney* standard were applied, Section 27-9 of the ordinance very specifically spells out what acts are prohibited. The "discriminatory practices" the ordinance seeks to prohibit are set forth in terms which give "fair notice" to the public and "fixed standards" to those enforcing the law. *See Maloney*, 63 Md. App. at 48-49.

II.

Interlocutory Injunction

Appellant asserts that the trial court also erred in failing to grant the interlocutory injunction based upon the grounds asserted other than the unconstitutionality of the ordinance arguments. *Department of Transportation v. Armacost*, 299 Md. 392 (1985), provides us with the standard for granting an interlocutory injunction:

> As a general rule, the appropriateness of granting an interlocutory injunction is determined by examining four factors: (1) the likelihood that the plaintiff will succeed on the merits; (2) the "balance of convenience" determined by whether greater injury would be done to the defendant by granting the injunction than would result from its refusal; (3) whether the plaintiff will suffer irreparable injury unless the injunction is granted; and (4) the public interest.

299 Md. at 404-05 (citing *State Department v. Baltimore County*, 281 Md. 548, 554-57 (1977)) (footnote omit-

ted). *See also TJB, Inc. v. Arundel Bedding Corp.*, 63 Md. App. 186, 190 (1985). The granting or denying of an injunction is a matter within the discretion of the trial court and will not be disturbed on appeal unless that discretion has been abused. *Seci, Inc. v. Chafitz, Inc.*, 63 Md. App. 719, 725 (1985).

In denying the interlocutory injunction appellant requested, the trial court listed the four factors set forth above and stated:

> That test having been laid out, the Court is not satisfied that any one of the four factors . . . have been met by the arguing Counsel, and for that reason, the Court declines to grant the request for injunctive relief.

Upon our review of the record, we affirm the trial court's denial of the interlocutory injunction. Appellant failed to meet any one of the four standards necessary to be granted the extraordinary remedy of interlocutory relief. Most notably, appellant is not likely to succeed on the merits and failed to show the irreparable injury which would result from continuation of the HRC proceedings.

JUDGMENT AFFIRMED;

COSTS TO BE PAID BY APPELLANT.

APPENDIX C

Order of the Court of Appeals of Maryland Denying a Writ of Certiorari

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IN THE COURT OF APPEALS OF MARYLAND

Petition Docket No. 240

September Term, 1986

HOLIDAY UNIVERSAL CLUB

v.

MONTGOMERY COUNTY, MARYLAND

(No. 1160, September Term, 1985
Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorari to the Court of Special Appeals in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

Judge Adkins did not participate in the consideration of this petition.

/s/ Robert C. Murphy
Chief Judge

Date: August 22, 1986

APPENDIX D

Notice of Appeal Filed by Appellant on November 6, 1986

IN THE
COURT OF SPECIAL APPEALS OF MARYLAND

HOLIDAY UNIVERSAL CLUB,
Appellant,

v.

MONTGOMERY COUNTY, MARYLAND, *et al.*,
Appellee.

No. 1160 September Term 1985

NOTICE OF APPEAL TO THE
SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Holiday Universal Club, the above-named appellant, hereby appeals to the Supreme Court of the United States from the final judgment of the Court of Special Appeals, entered on May 15, 1986, denying an injunction in this case. The Court of Appeals of Maryland denied a petition for certiorari on August 22, 1986.

Appeal is taken pursuant to 28 U.S.C. § 1257(2).

Respectfully submitted,

BECKETT, CROMWELL & MYERS, P.A.

By: /s/ David E. Manoogian
DAVID E. MANOOGIAN

By: /s/ Jean M. Jones
JEAN M. JONES
6610 Rockledge Drive
Suite 400
Bethesda, Maryland
20817
(301) 897-8282

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on this 6th day of November, 1986, a copy of the foregoing Notice of Appeal to the Supreme Court of the United States, was mailed, postage prepaid to Paul McGuckian, Esquire and to Joyce R. Stern, Esquire, Office of the County Attorney, Executive Office Building, 101 Monroe Street, Rockville, Maryland 20850.

By: /s/ David E. Manoogian
DAVID E. MANOOGIAN

APPENDIX E

Relevant Provisions of the First, Fourth, Fifth, Ninth and Fourteenth Amendments and of the Montgomery County Code, Chapter 27

FIRST AMENDMENT

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FIFTH AMENDMENT

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

NINTH AMENDMENT

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

FOURTEENTH AMENDMENT

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * *

MONTGOMERY COUNTY CODE

ARTICE I. COMMISSION ON HUMAN RELATIONS

Sec. 27-1. State of policy.

(a) It is the public policy of Montgomery County:

(1) To eliminate discrimination, prejudice, intolerance, and bigotry that exists as described in this article:

a. On account of race, color, sex, religious creed, ancestry, national origin, handicap, marital status, or sexual orientation in housing, employment, and public accommodations;

b. On account of age in employment;

c. On account of the presence of children in housing; and

(2) That the discrimination, described in paragraph (1):

a. Is injurious to and threatens the health, safety, and welfare of persons in this county;

b. Is contrary to the purposes of a free, democratic society;

c. Is illegal and should be abolished; and

(3) That the prejudice, intolerance, and bigotry, described in paragraph (1) only refers to persons who do not treat individuals with the basic respect that the individuals deserve as human beings.

(b) It is not the public policy of Mongomery County:

(1) To advocate, encourage, promote, or endorse any particular race, color, sex, religious creed, ancestry, national origin, marital status, age, or sexual orientation including homosexuality; or

(2) To promote the absence or presence of children in housing; or

(3) To eliminate the legitimate rights of citizens to safeguard their communities and work places from public conduct that is contrary to accepted community standards of public decency.

(c) The prohibitions in this article are substantially similar, but not necessarily identical, to prohibitions in federal and state law. The intent is to assure that a complaint filed under this article may proceed more promptly than possible under either federal or state law. It is not county policy, however, to create a duplicative or cumulative process to those existing under similar or identical state or federal laws. Once a complaint is fully adjudicated under a similar or identical state or federal law, the complaint should not be reprocessed under this article if the effect is duplicative or cumulative. (1969 L.M.C., ch. 33, § 1; 1972 L.M.C., ch. 21, § 1; 1977 L.M.C., ch. 30, § 1; 1978 L.M.C., ch. 6, § 1; 1984 L.M.C., ch. 26, § 1.)

Sec. 27-1A. Applicability of chapter within incorporated municipalities.

The provisions of this chapter shall apply within the corporate limits of any incorporated city, village or town within the county which by law has been given express authority to adopt or enact legislation prohibiting discrimination based on race, color, sex, marital status, age, religious creed, ancestry, handicap, sexual orientation, or national origin; provided, such city, village or town shall adopt the provisions of this chapter and provide for its enforcement within the corporate limits of such incorporated city, village or town by the county. (1947 L.M.C., ch. 53, § 1; 1984 L.M.C., ch. 26, § 2.)

* * * *

Sec. 27-8. Applicability of article.

This article applies to discriminatory practices in places of public accommodation within the territorial limits of the county, and shall apply and be applicable to every place of public accommodation, resort or amusement of any kind in the county whose facilities, accommodations, services, commodities or use are offered to or enjoyed by the general public either with or without charge, and shall include, but not be limited to, the following types of places, among others: All restaurants, soda fountains and other eating or drinking places where food is sold for consumption either on or off the premises; all inns, hotels and motels, whether serving temporary or permanent patrons; all retail stores and service establishments; all hospitals and clinics; all motion picture, stage and other theaters and music, concert or meeting halls; all circuses, exhibitions, skating rinks, sports arenas and fields, amusement or recreation parks, picnic grounds, fairs, bowling alleys, golf courses, gymnasiums, shooting galleries, billiard and pool rooms and swimming pools; all places of public assembly and entertainment of every kind; but shall not include any accommodations which

are in their nature distinctly private, or those accommodations which make distinctions based upon sex including such facilities as private schools, rest rooms, dressing rooms, locker rooms, or other dressing facilities. (Mont. Co. Code 1965, § 77-9; Ord. No. 6-43; 1969 L.M.C., ch. 33, § 1; 1972 L.M.C., ch. 21, § 1.)

Sec. 27-9. Prohibited acts.

It shall be unlawful for any owner, lessee, operator, manager, agent or employee of any place of public accommodation, resort or amusement within the county:

(a) To make any distinction with respect to any person based on race, color, sex, marital status, religious creed, ancestry, national origin, handicap, or sexual orientation in connection with admission to, service or sales in, or price, quality or use of any facility or service of public accommodation, resort or amusement in the county.

(b) To display, circulate or publicize or cause to be displayed, circulated or publicized, directly or indirectly, any notice, communication or advertisement which states or implies that any facility service, commodity or activity in such place of public accommodation, resort, or amusement will not be made available to any person in full conformity with the requirements of subsection (a) of this section or that the patronage or presence of any person is unwelcome, objectionable, unacceptable or not desired or solicited on account of any person's race, color, sex, marital status, religious creed, ancestry, national origin, handicap, or sexual orientation. (Mont. Co. Code 1965, § 77-10; 1969 L.M.C., ch. 33, § 1; 1972 L.M.C., ch. 21, § 1; 1978 L.M.C., ch. 6, § 4; 1984 L.M.C., ch. 26, § 8.)

* * * *

APPENDIX F

Decision and Order of the Public Accommodations Panel of the Montgomery County Commission on Human Relations

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MONTGOMERY COUNTY COMMISSION ON
HUMAN RELATIONS
164 Rollins Avenue
Rockville, Maryland 20852
PUBLIC ACCOMMODATIONS PANEL

Case Numbers: PA-511, PA 512, PA 514

BRUCE POLLEKOFF, RONALD BUSCH, EARNEST SAHADY,
Complainants

VS.

HOLIDAY SPAS, HOLIDAY SPA ESPRE CENTER, HOLIDAY UNIVERSAL CLUB OF ROCKVILLE, INC., HOLIDAY FITNESS AND RACQUET CLUB, INC., U.S. HEALTH, INC.,
Respondent

DECISION AND ORDER

Background:

Between August 7 and August 17, 1984, Bruce Pollekoff, Earnest Sahady and Donald Busch, three male members of the Holiday Spa Espre Center in Rockville, Maryland ("Holiday" is used to identify the various names under which the Respondent operates: Holiday Spas, Holiday Health Spa; Holiday Spa, Espre Center; Holiday Universal Club of Rockville, Inc.; Holiday Fitness and Racquet Club of Rockville, Inc.; Holiday Universal, Inc.; and U.S. Health, Inc.) filed formal complaints on the basis of sex discrimination against Holiday, a coed health

and fitness club. The Complainants alleged to the Montgomery County Human Relations Commission ("the Commission") that although Holiday's sales staff had either implied or confirmed directly that aerobic dance was available to all members, the Holiday Espre Club Center continuously denied men participation in aerobic dance classes that were open to females.

Following an investigation and noting disparate treatment, the Executive Director of the Commission issued a finding on December 27, 1984, which found reasonable grounds to believe that illegal discrimination had occurred in these cases. After conciliation efforts failed, the Commission's Executive Director certified these cases to the Public Accommodations Panel (the Panel) for a combined public hearing. The Panel heard the cases during nine sessions between June 18, 1985 and July 30, 1985. The Complainants sought equal access to classes rather than a refund of membership fees offered by Holiday.

The Complainants appeared before the Panel with five other supporting witnesses: The Commission's Investigator for these cases, three Spa members and an exercise physiologist. Respondent presented testimony from U.S. Health Vice President and General Counsel, the exercise physiologist responsible for the U.S. Health, Inc. program development, the U.S. Health, Inc. aerobic dance coordinator, and an aerobic dance instructor who coordinates the aerobic dance program for the Holiday Spa located in Greenbelt, Maryland.

The Complainants testified to a strong interest in their own physical fitness, specifically through the enjoyment and skill derived from receiving personal instruction in aerobic dance. Rather than limiting themselves to exercising with the aerobic dance video tapes which Holiday provided, they attempted access to the aerobic dance classes. After instructors refused them entrance early in 1984, two of the Complainants appealed unsuccessfully to Vice

President Donald Goldman of the parent company, U.S. Health, Inc. Thereafter Complainants sought remedial action through the Commission.

The Respondent argued that targeting aerobic dance classes to 25-35 year old females of average fitness and aerobic capacity and then limiting class attendance to females does not constitute illegal discrimination. Respondent claimed painstaking development of the aerobic dance program, careful control of its implementation and a desire not to alter the process. Respondent's business necessity defense involved the contention that women would not attend classes if men participated; therefore the company would lose business.

DISCUSSION

Respondent maintains that it will not accept men into its aerobic dance classes, asserting business necessity as listed and summarized below (R). Complainants' (C) responses follow and are indented.

(R) 1. *Aerobic dance class is targeted for women of average fitness.*

Holiday's aerobic dance program has been developed especially for women. The intensity, type, frequency and duration of the exercise is meant only for the target group, those women 25-35 years old with an average aerobic capacity. The class is designed to give the greatest possible benefits to Holiday's typical female member. Respondent feels that homogeneity is important to the class.

(C) Women, whose heart rates, oxygen uptake rate and ages are unknown to management and instructors, are allowed to come and go at will from aerobic dance, even though their aerobic capacity may exceed

or fail to meet the target rate. They may participate simply because they are female. Holiday never learns whether or not class membership is homogeneous in the way they intended. Holiday does not measure aerobic capacity following class participation for a given period of time and does not plan intensity changes if the class is different from the target group. Females of all aerobic capacities get the same level of aerobic dance exercise.

(R) 2. *Female attendance will suffer.*

According to Respondent, many women object to having men in their classes. In the presence of men, women feel inhibited and embarrassed doing aerobic dancing because some Holiday dance routines require sexually suggestive positions and because some women feel unattractive in leotards when they are relatively unfit. Holiday would also have to reduce the class time for women to accommodate men. The coed "experiment" at the Greenbelt Holiday Spa has drawn few men and has turned off many women, Respondent stated.

(C) Respondent has offered no statistics regarding complaints about men taking classes. Often outside observers rather than male class members make female participants uncomfortable. One member testified about an informal poll conducted by her aerobic dance instructor at the Bethesda Holiday Spa; the poll showed that approximately 90% of her class would not object to men in the class, especially if women-only classes remained available.

(R) 3. *Injuries would increase.*

Injuries would increase with men in attendance, Respondent believes. Men need more space for dance than the average woman. According to Respondent's exercise physiologist, men generally have greater body mass and generally higher aerobic capacity. Since they are likely to exercise harder, jump higher and land harder, these men risk injury.

(C) Respondent has shown only one reported injury in three years (and that to an instructor) from a Holiday sponsored class, and has furnished no statistics to back up claims that men might be injured more frequently. The Commission's exercise physiologist says that men with greater body mass and greater strength can better absorb the added landing force when jumps are higher. Intructors showing the proper way to do the exercise can decrease the risk of injury. Regarding usage of classrooms, a 5′8″ man and a 5′8″ woman take the same space.

(R) 4. *Men will not benefit from Holiday's aerobic dance program.*

Respondent claims that the program would not produce a significant conditioning effect or cardiovascular benefit for men unless grossly underfit, since men are typically twice as strong as women in the same age group and have 15-20 percent more aerobic capacity. The program is especially inappropriate for the three very athletic Complainants, Respondent said.

(C) The Commission's exercise physiologist counters that even those trained in sports

could benefit from a low level of intensity in aerobic dance and could choose to adjust the intensity; exercising with others, learning to become more flexible or performing patterns to music can be considered worthwhile objectives.

(R) 5. *Developing aerobic dance programs suitable for males will be too costly.*

Since few men show an interest in taking aerobic dance at Holiday, development costs for a men's aerobic dance program, which Respondent estimates at $50-75,000, would be prohibitive. Holiday's is a well-planned, properly designed, tested and quality-controlled program that is expensive to change. No real male market exists to warrant this expense.

(C) Complainants are just asking for the same access to classes that women have. Coed dance/exercise business are present both locally in Montgomery County and nationwide. Holiday does have one coed class in the D.C. metropolitan area. Holiday only admits men into its aerobic dance class in its Greenbelt spa at the inconvenient time of 8:30 p.m. During that class there are often more members than the number attending the all-female 8:00 p.m. class. The 8:30 class includes nine to ten men, according to one witness.

(R) 6. *Comparisons with other aerobic dance companies are unfair to Holiday.*

Respondent claims greater financial risk than Jazzercise or Jacki Sorenson, which offer most of their classes in rented facilities. Holiday has

fixed facilities built at great expense and risks more with its programming.

(C) The permanence of the facility where other exercise organizations in Montgomery County hold coed aerobic dance classes is not important to the prima facie case; the Commission has focused instead on the accessibility of classes to men. These companies and also others with fixed facilities offer the same dance/exercise programs to both women and men.

(R) 7. *The legal relationship of the various Spas is irrelevant.*

Liability at one Spa does not mean liability at all the others.

(C) The relationship of Holiday Spas; Holiday Spa, Espre Center; Holiday Universal Club of Rockville, Inc.; Holiday Fitness and Racquet Club, Inc.; Holiday Health Spa; Holiday Spa of Bethesda; Holiday Health of Bethesda, Inc.; and Holiday Health of Silver Spring, Inc. to Holiday Universal, Inc. and U.S. Health, Inc. has been shown through exhibits of pool, bar, and construction licenses granted to the three Holiday Spas located in Montgomery County. Testimony, evidence and exhibits demonstrate that these names are used interchangeably by the owners of the facility to describe the facility's ownership. U.S. Health, Inc. officials indicated that Holiday is owned by U.S. Health, Inc. At the hearing on PA-511, 512 and 514, counsel for the Respondent identified as his client the Vice President and General Counsel of

U.S. Health, Inc. Each must follow the County law.

(R) 8. *The Montgomery County Code does not define illegal "discrimination."*

Discriminatory practice is not adequately defined in Chapter 27 of the Montgomery County Code. Respondent has not set up its class plans with an intent to discriminate. Moreover, Respondent claims that without an intent to discriminate, there is no illegal discrimination. Prohibiting males from taking aerobic dance classes is not discrimination, but is a marketing decision only. Respondent's Membership Contract paragraph 17 states that the company may "change its rules, regulations and hours of operation at any time."

(C) Chapter 27 of the Montgomery County Code details discriminatory practice. Holiday staff and members have testified that women have full access to all current membership benefits, while men are denied participation in aerobic dance. Membership costs in each category are the same for women and men. Thus, illegal discrimination has occurred.

CONCLUSION

The Commission successfully established a prima facie case by showing that the Complainants asked for and were denied access to a program in a facility which sells memberships to the public. None of the Chapter 27 exemptions applied in these cases. The three Complainants, qualified by their standing as members of the Holiday Spa Espre Center located in Rockville, Maryland, were informed that, as males, they could not participate

in the aerobic dance classes at the Rockville Holiday facility. While Respondent undisputedly sells memberships to both sexes at the same price, clearly aerobic dance classes continued to be open to females and closed to males.

Respondent's advertising depicts all activities of the Espre Center as being available to men as well as women. Yet even men of the same aerobic capacity as the female target group are barred from aerobic dance at the insistence of top corporate officials. One Complainant stated that a U.S. Health, Inc. Vice-President told him "they had no intention of initiating it [coed aerobic dance instruction] and never would have it." Another U.S. Health Inc., Vice President (and General Counsel) testified that the Chairman of the Board would never approve coed aerobic dance classes.

The Panel found no convincing evidence that a business hardship would result from ending the discriminatory aspect of Holiday's program offering. Fear of market loss has for many years been considered an invalid defense against discrimination charges. The insistence by Holiday upon uniformity, rigid controls and the need for a supposedly homogeneous population in each aerobic dance class is a cover for favoring one group over another. Men can both benefit from a class for females of average fitness and can participate without causing unsafe conditions. As women and men already co-exercise in swimming, track running, weight lifting and circuit training in the Rockville and Bethesda Holiday Spas, Respondent did not demonstrate that large numbers of women would quit the Rockville Espre Center if men were to be able to take aerobic dance classes with them. Admission of men to aerobic dance classes is common nationally and in the Washington, D.C. metropolitan area, including Montgomery County. In summary, barring men from aerobic dance at the coed Holiday Spas is illegal discrimination.

Eliminating sex discrimination is a public policy that the Panel believes should override Holiday's desire to carry on aerobic dance classes as designed.

Therefore, the Public Accommodations Panel by a 3-0 vote finds that between early 1984 and August 1984, Holiday Spas; Holiday Spa, Espre Center; Holiday Universal Club of Rockville, Inc.; Holiday Fitness and Racquet Club, Inc.; Holiday Universal, Inc., and U.S. Health, Inc. have violated the sex discrimination provision of the Montgomery County Code 1984, titled "Human Relations and Civil Liberties" as amended, Section 27-9, stating that it is unlawful

> "for any owner, lessee, operator, manager, agent, or employee of any place of public accommodation, resort or amusement within the County:
>
> a) To make any distinction with respect to any person based on . . . sex . . . in connection with admission to, service or sales in, or price, quality or use of any facility or service of any place of public accommodation, resort or amusement in the County.
>
> b) To . . . publicize . . . directly or indirectly . . . that any facility, service, commodity or activity in such place of public accommodation, resort or amusement will not be made available to any person in full conformity with the requirements of subsection (a) of this section or that the patronage or presence of any person is unwelcome, objectionable, unacceptable or not desired or solicited on account of any person's . . . sex . . ."

The Panel is aware of its responsibility to order suitable discrimination remedies without causing an unreasonably heavy financial burden for Respondents. Clearly, several non-discriminatory alternatives are available which are consistent with Holiday's overall business purpose and would not appear to lead to business hardship.

No appreciable costs are required to absorb men into its present aerobic dance classes, for example.

Because there are three Spas under the Respondent's ownership within the Commission's jurisdiction, the Panel decided that any remedy must refer to all Holiday Spas in Montgomery County or to any health and exercise clubs owned, operated or under the control of any of the Respondents in these cases doing business in Montgomery County.

REMEDY

The Panel, voting 3-0, now orders the Respondent to do the following:

1) No later than ten (10) days from the date of this order, all facilities of Holiday Spas; Holiday Spa, Espre Center; Holiday Universal Club of Rockville, Inc.; Holiday Fitness and Racquet Club, Inc.; Holiday Health Spa; Holiday Spa of Bethesda; Holiday Health of Bethesda, Inc.; Holiday Health of Silver Spring, Inc.; Holiday Universal, Inc. and U.S. Health, Inc. located in Montgomery County must (a) offer men and women either equal access to the same aerobic dance classes and facilities or (b) offer a substantially similar opportunity to participate in aerobic dance classes and facilities.

2) By November 15, 1985, Holiday must submit a written plan for the Panel to review detailing equal or similar aerobic dance opportunity for women and men at each Montgomery County Holiday facility. This must include the hours, the locations within each facility and to which membership subgroups the aerobic dance instruction will be available.

3) Respondent must immediately post inside each Montgomery County Holiday facility for one year a notice of a size not less than 8½" x 14" stating that Holiday does not discriminate on the basis of sex and that

it welcomes men into its aerobic dance classes. Holiday must post this notice in places that are clearly visible to potential customers and to members at the front desk and at the doors outside aerobic dance and locker rooms. Accompanying this notice must be a schedule for current aerobic dance classes. Respondent must also add immediately and continuously for one year the same statement to any advertising distributed in Montgomery County relating to Montgomery County Holiday facilities.

A Panel hearing on damages will be held promptly after this 30-day notice. The Panel suggests October 14, 15, 22, or 23, 1985 for the damage hearing and requests that the parties inform the Panel of their availability on these dates.

PUBLIC ACCOMMODATIONS PANEL

Date: September 13, 1985

Vote: Unanimous

/s/ Susan S. Shoenberg
SUSAN S. SHOENBERG

/s/ John (Sean) F. Buchan
JOHN (SEAN) F. BUCHAN

/s/ Phoebe M. Liddle
PHOEBE M. LIDDLE

Rehearing and reconsideration: Where otherwise permitted by law, any request for rehearing or reconsideration shall be filed within ten days from a final decision. Thereafter a rehearing or reconsideration may be approved only in the case of fraud, mistake or irregularity. Any request for rehearing or reconsideration shall be in writing, containing supporting reasons therefor, with copies served on all parties of record. Any decision on a request for rehearing or reconsideration not granted within ten days following receipt of the request therefor in accord with subsection (c) of this section shall be deemed denied. Any request for rehearing or reconsideration shall stay the time for any administrative appeal pursuant to judicial review until such time as the request is denied or in the event such request is granted such further time or a subsequent decision is rendered. A request for reconsideration or rehearing shall not stay the operation of any order unless the hearing authority so states.

Judicial review: Any party aggrieved by a final decision in a case governed by this chapter, whether such decision is affirmative or negative in form may appeal said decision to the Circuit Court for Montgomery County,

Maryland, in accord with the provisions of the Maryland Rules of Procedure governing administrative appeals. Said Court shall have the power to affirm, reverse or modify the decision or remand the case for further proceedings as justice may require. The filing of such appeal shall not stay the order of the hearing authority. Any party to the proceedings in the Circuit Court may appeal from such decision to the appellate courts of Maryland pursuant to applicable provisions of the Maryland Rules of Procedure. (1978 L.M.C. ch. 30, section 1)